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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

EPLUS GROUP, INC.,

Petitioner,

v.

CARESOUTH HOME HEALTH SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit created an intolerable conflict with decisions of the Eleventh[1] and Seventh[2] Circuits by ignoring the argument that a district court violates due process of law, when, *after* a case is tried, it raises *sua sponte* a fact intensive issue and proceeds to decide the case on the merits without giving the losing party an opportunity to introduce evidence relevant to the new issue.

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1. *Jefferson Fourteenth Ass. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 527 (11th Cir. 1983)

2. *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177 (7th Cir. 1989).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petitioner is ePlus Group, inc. ("ePlus"), a wholly owned subsidiary of ePlus, inc., a publicly owned corporation.

Respondent, Caresouth Home Health Services, is the only other interested party to this proceeding.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals is dated April 22, 2003 and reproduced in Appendix A. The unpublished memorandum opinion and order of the district court dated June 10, 2002 is reproduced in Appendix B.

STATEMENT OF JURISDICTION

The judgment which this petition seeks to have reviewed was entered April 22, 2003. Petitioner timely filed a Petition for Rehearing *En Banc*. The Court of Appeals denied the Petition For Rehearing *En Banc* on May 19, 2003. (App. C)

This court has certiorari jurisdiction over this case under 28 U.S.C. § 1254. The court of appeals' jurisdiction was based on 28 U.S.C. § 1291, and the district court had jurisdiction over this case under 28 U.S.C. § 1332.

STATEMENT OF THE CASE

ePlus is an equipment leasing company. ePlus leased equipment which ePlus owned to respondent under several equipment schedules. When two of the equipment schedules ended, respondent attempted to exercise fair market value purchase options but did so late. On a third equipment schedule, respondent sought a one-month extension at expiration when the lease documents set the minimum extension at 3 months. ePlus sued for holdover rents. Respondent attempted to defend on the ground it had acquired title to some of the schedules from another party, EAB Leasing ("EAB"). EAB had, in error, given a deed to the equipment to respondent for no value, but, upon realizing

its error, EAB rescinded the deed. Respondent also contended that its errors in exercising purchase options were not material. Respondent introduced evidence that the fair market value of the equipment was zero, while ePlus contended this was irrelevant; having failed to meet contractual requirements to exercise its purchase options, respondent's choice was to either return the equipment or keep it and pay holdover rents in accordance with the lease terms. Caresouth counterclaimed for the return of holdover rents it had paid on other lease schedules.

The case was tried to Judge Cacheris on a stipulated record. The parties set forth the arguments noted above. Under certain circumstances, a document denominated as a lease can be recharacterized as a disguised security interest. *See Uniform Commercial Code* ("U.C.C.") § 1-201(37); *Garcia Enterprises, Inc. v. Enterprise Ford Tractor, Inc.*, 253 Va. 104, 480 S.E. 2d 497 (1997). *See generally*, E. Huddleson, *Old Wine in New Bottles: Uniform Commercial Code Article 2A – Leases*, 39 Ala. L. Rev. 615 (1988), J.J. White & R.S. Summers, *Commercial Law Treatise* Ch. 30 (4th Ed. 1995). This is a fact-intensive issue and the most litigated subject in leasing law. *Id. See also* L. Flick, E. Huddleson & S. Whelan, *The Uniform Commercial Code Survey: Leases*, 54 Bus. Law 1855, 1857 (1999). The current test is the so-called "economic reality" test under which the court determines whether, at the *outset* of the lease, the lessor retained a meaningful residual interest in the leased property. *Id. See generally*, *In re Edison Bros. Stores Co.*, 207 BR 801 (Bankr. D. Del. 1997). *Neither* party contended at the trial that the lease schedules in this case were disguised security interests, and, as a result, there was no evidence introduced by either side as to whether ePlus, as the lessor, understood at the outset of the leases, that it was or was not retaining a meaningful residual value in the leased property.

After six months, Judge Cacheris issued findings of fact and conclusions of law finding for respondent on all but one lease schedule. The basis of his decision was that he recharacterized the leases as disguised security interests. Judge Cacheris injected this issue into the case *sua sponte*, and, rather than allowing evidence on the point, he decided it against ePlus on the closed record. He reasoned (erroneously, according to the decided cases, *see Edison Bros. Stores*, *supra*), that he could "back into" ePlus' residual value reasoning at the start of the lease[1] from the fact that, by the end of the lease, the property had lost its value. Based on this reasoning and his condemnation of ePlus for what he called "sharp business practices," Judge Cacheris tortured the law to reach a result for respondent.

On appeal, ePlus raised as its primary issue the due process claim raised here. The appeal was heard by a Fourth Circuit Panel consisting of Judges Shedd, Traxler & Hamilton. After hearing extensive argument on the point of what evidence ePlus would have introduced on the true lease/ security interest issue, the court of appeals panel issued a *per curiam* decision merely stating it found no reversible error. The Fourth Circuit denied rehearing without request by any member of the court for a poll on rehearing *en banc*.

ePlus petitioned for rehearing *en banc* May 2, 2003. The court of appeals issued an order May 19, 2003 denying the petition.

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1. "Foresight, not hindsight, controls." 4 White & Summers, *supra*, § 30.3 at 24.

REASONS FOR GRANTING THE PETITION

The petition should be granted, because the court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Rule 10(a). ePlus realizes that there "must be a real or 'intolerable' conflict, not merely an inconsistency in dicta or in the general principles criticized." R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 225 (8th ed. 2002). ePlus believes the Fourth Circuit's decision is in intolerable conflict with the Eleventh Circuit and Seventh Circuit.

In *Jefferson Fourteenth Associates*, *supra*, the Eleventh Circuit held that, where a court acts *sua sponte* to reach decision without giving the affected party an "opportunity to develop the facts supporting its claim," the court violates the affected party's due process rights. In *Ricketts*, *supra*, the Seventh Circuit reached the same conclusion. Aside from due process considerations, the Seventh Circuit in *Ricketts*, *supra*, has noted several reasons why a notice and opportunity to respond requirement is a necessary predicate to dismissal which apply here, namely, that *sua sponte* decisions "may often conflict with the traditional adversarial precepts of our system of justice, and tend to make the district court seem like a proponent rather than an independent entity," *id.*, and that *sua sponte* action with no opportunity to respond "may prove wasteful of the court's limited resources rather than expeditious, for it often leads to a shuttling of lawsuits between the district and appellate courts." 874 F.2d at 1184 (citations omitted).

The Chief Justice has stated, "[t]here are really only two or three factors comprised in the certiorari decision – conflict

with other courts, importance and the perception that the decision is wrong in light of Supreme Court precedent." Chief Justice Rehnquist, The Supreme Court, How it was, How it is. 266 (1987), quoted in Stern, Gressman, Shapiro, Geller, *supra* at 258. In this case, the issue presented is of great public importance in the administration of jurisdiction of the district courts. It is intolerable to allow a trial court to decide, after trial, that it dislikes one side's position but cannot reach the desired result based on the law and to *sua sponte* raise a new issue to get to its result without allowing the loser to put in evidence. This is the worst kind of arbitrary decision-making.

The Fourth Circuit panel was obviously satisfied to let the result stand regardless of the legal errors and denial of an opportunity to be heard because the trial court sprinkled its opinion with many statements that ePlus was bad.

ePlus has no way of knowing what internal politics caused the Fourth Circuit panel to decide this case in such a strange manner, issuing an unpublished opinion without even addressing the crucial due process issue which ePlus raised at the first opportunity. Presumably, the unpublished nature of the opinion was an effort to evade review in the Fourth Circuit or here. In these days of online access to decisions, however, the district court's decision is readily available on Lexis, Westlaw and elsewhere and, unless *certiorari* is granted, will stand as a broad precedent. Accordingly there is no justification to refuse review to this case – which otherwise warrants review – because the panel marked the decision unpublished and said nothing on the crucial issues.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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